IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

TUESDAY, THE 13TH FEBRUARY 2007 / 24TH MAGHA 1928

OP.No. 22784 of 1997(K)

PETITIONER:

THE SREE NARAYANA TRUSTS, KOLLAM,
REPRESENTED BY ITS SECRETARY,
VELLAPPALLY NATESAN, S.N. TRUST OFFICE,
KOLLAM.

BY ADV. SRI.A.N.RAJAN BABU.

RESPONDENTS:
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1. **THE STATE OF KERALA, REPRESENTED BY ITS CHIEF SECRETARY TO GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.**

2. **THE UNIVERSITY OF KERALA, REPRESENTED BY THE REGISTRAR, UNIVERSITY OF KERALA, UNIVERSITY OFFICE, THIRUVANANTHAPURAM.**

***ADDL.R.3.** **THE ALL KERALA PRIVATE COLLEGE TEACHERS' ASSOCIATION, VANCHIYOOR, THIRUVANANTHAPURAM-35, REPRESENTED BY ITS PRESIDENT.**

***IMPLEADED AS PER ORDER DTD. 28/01/98 ON C.M.P. NO. 3206/98.**

***ADDL. R.4 TO R.10 IMPLEADED:**

4. **R. CHANDRASENAN,**
SELECTION GRADE LECTURER IN ECONOMICS,
S.N. COLLEGE, SIVAGIRI, VARKALA.

O.P. NO. 22784/1997:

5. RAJAGOPAL,
LECTURER IN BOTTANY,
S.N. COLLEGE,
ALA, CHENGANNUR.

6. T. SURESH,
SENIOR LECTURER IN CHEMISTRY,
S.N. COLLEGE FOR WOMEN,
KOLLAM.

7. P. KALYANIKUTTY,
SELECTION GRADE LECTURER IN SANSKRIT,
S.N. COLLEGE, CHERTHALA.

8. D. PRASAD, LECTURER IN ENGLISH,
S.N. COLLEGE, PUNALOOR.

9. SHYNE.D., LECTURER IN COMMERCE,
S.N. COLLEGE, CHATHANNUR.

10. M. SUBEDA DEVI, LECTURER (SELECTION GRADE),
T.K. MADHAVA MEMORIAL COLLEGE,
NANGIARKULANGARA, ALAPPUZHA.

***ADDL.R.4. TO R.10 IMPLEADED AS PER ORDER DTD. 09/02/98 ON C.M.P. NO. 4452/98.**

BY ADV. SRI.S.MUHAMMED HANEEFF
SRI.T.P.KELU NAMBIAR (SR.)
SRI.ELVIN PETER P.J.
SRI.M.RAJAGOPALAN NAIR, SC, KERALA UTY.,
SRI. P.A. SALIM.

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 13/02/2007, ALONG WITH OP NO. 21788/1998 AND CONNECTED CASES,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P. NO. 40748/1997 IN O.P. NO. 22784/1997

DISMISSED

SD/- J.B. KOSHY, JUDGE,

13/02/2007. **SD/- T.R. RAMACHANDRAN NAIR, JUDGE.**

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P.1: COPY OF THE STATUTE (INTERIM UNIVERSITY TRANSFER OF TEACHERS OF COLLEGES OF KERALA UNIVERSITY.

EXT.P.2: COPY OF THE STATUTE PUBLISHED BY THE CALICUT UNIVERSITY.

EXT.P.3: DO. DO. MAHATMA GANDHI UNIVERSITY.

EXT.P.4: COPY OF THE JUDGMENT IN W.A. NO. 380/91.

EXT.P.5: COPY OF THE NOTIFICATION NO. ACAD. L/3254/CSS/96 DTD. 06/08/1997.

EXT.P.6: COPY OF THE ORDER DTD. 25/03/1997 G.O. (MS). NO. 47/91/H. EDN.

EXT.P.7: COPY OF THE SPECIMEN AGREEMENT ENTERED INTO BETWEEN THE EDUCATIONAL AGENCY AND THE GOVERNMENT.

EXT.P.8: COPY OF THE RULES FOR DIRECT PAYMENT OF SALARIES TO TEACHING AND NON-TEACHING STAFF OF PRIVATE COLLEGES.

EXT.P.9: COPY OF THE LETTER DTD. 17/03/1997 FROM THE PRINCIPAL SECRETARY TO GOVERNMENT HIGHER EDN. (B) DEPARTMENT.

RESPONDENT'S EXHIBIT:

EXT. R2.A: COPY OF THE LETTER DT. 17/03/97 FROM THE PRINCIPAL SECRETARY TO GOVERNMENT HIGHER EDN. (B) DEPT. ADDRESSED TO THE SECRETARY TO GOVERNOR.

//TRUE COPY//

prv.

J.B.KOSHY & T.R.RAMACHANDRAN NAIR, JJ.

O.P.NOS.22784 OF 1997, 2783, 4666, 7653
&
21788 OF 1998,
W.P.(C).NOS.25521 OF 2004,
W.P.(C).NOS.15434 & 15477 OF 2005 ()

Dated this the 13th day of February, 2007

J U D G M E N T

KOSHY,J.

In all these writ petitions main issue to be considered is the extent of the power of the Kerala University to issue first statute regarding transfer of teachers of Colleges under corporate Managements affiliated to the University. University of Kerala was reorganised by the Kerala University Act 1974 (Act 17 of 1974). By using powers under Section 83 of the Kerala University Act, Government of Kerala issued Kerala University, (Intra University Transfer of Teachers of Colleges under Corporate Managements having Colleges affiliated to the Kerala University First Statute, 1990). The above is produced as Ext.P1 in W.P.(C).No.25521/2004. A Division Bench of this Court in W.A.No.380/1991 (Ext.P2 in W.P.(C).No.25521/2004)

held that Government has no power to issue such First Statute but it is for the authorities of the University to make relevant Statutes regarding the same. It was observed as follows:

> "We have only held that the Government has no power to exercise its power under the corresponding provisions of the three University Acts in regard to this matter. This will not affect the power of the authorities of the Universities to make relevant statutes in the matter, in accordance with the provisions of the Act. The provisions in the University Acts are clear that the Senate or the Syndicate, as the case may be, has the power to make relevant statutes prescribing conditions of service of private college teachers, notwithstanding the cessation of Government's power."

Division Bench also held that under the Kerala University Act power is vested with the Senate to pass First Statute. In view of the above judgment the First Statute passed by the Government was set aside without going to the merits of other questions raised by the petitioner. Apex Court dismissed the appeal without prejudice to the right of the University to make appropriate statutes regarding service conditions. Thereafter Senate of the Kerala University passed and incorporated Chapter 4-A to the first statute regarding intra University

transfer of teachers of colleges under Corporate managements having colleges affiliated to the University. The petitioners in O.P.No.22784/1997, O.P.No.2783/1998 and O.P.No.7653/1998 mainly challenges the above amendment incorporating Chapter 4 A to the first Statute. W.P.(C).No.15434/2005 and W.P.(C). No.15477/2005 challenges the order of the University Appellate Tribunal passed in regard of the transfer of petitioners. Those petitioners got employment in other Universities but subsequently transferred to the Kerala University and their main grievance is regard to reckoning of years of service and norms of transfer in Chapter 4-A of the First Statute.

2. We may first consider the argument advanced by the petitioners, who are challenging amendment incorporating Chapter 4-A to First Statute. Their contentions are:

(1) As per the University Act, no statute can be passed regarding the transfer of an employee even though statute can be passed regarding the conditions of service. The transfer is not a condition of service. Therefore Chapter 4-A (Ext.P1 in

O.P.No.2783/1998) is illegal and is liable to be set aside.

(2) Before making a statute, no prior approval was obtained from the Government and therefore, even if the University has the power to frame the statute, Ext.P1 is illegal as prior sanction of the Government was not obtained.

(3) The appointment is the right of the management and transfer is incidental to appointment and therefore fixing norms for transfer by the statute is infringement of the right of the management and therefore the statute regarding the transfer is liable to be set aside.

(4) Finally it was contended that the norms prescribed are unreasonable and arbitrary and even in administrative necessity, management's power to transfer is taken away and therefore Chapter 4-A is liable to be set aside.

3. Section 5(xiii) of the Kerala University Act provides that with the previous sanction of the Government, University can

frame statute, regulate the emoluments and prescribe the duties and conditions of service of teachers and non-teaching staff in private colleges. Section 19(2)(h) also gives power to the Senate to make, amend or repeal statutes regarding the conditions of service of teachers or non-teaching staff in private colleges with the previous concurrence of the Government. It is the contention of the petitioners that Section 60(1) only enables the University to prescribe the conditions of service by framing statutes and it will not include the transfer of service. Section 60(1) reads as follows:

> "60. **Conditions of service of teachers of private colleges:-** (1) Notwithstanding anything contained in any law or in any contract or other document, the conditions of service of teachers of private colleges, whether appointed before or after the commencement of this Act, including conditions relating to pay, pension, provident fund, gratuity, insurance and age of retirement, shall be such as may be prescribed by the Statutes."

It only says that the conditions of service shall be regulated by the statute and the working conditions of service including pension, provident fund, gratuity etc. and transfer is not a

condition of service. Relying upon the observations of the Apex Court in ***B.Varada Rao v. State of Karnataka (A.I.R. 1986 SC 1955)*** it was argued that transfer is an incident of service. Therefore according to the petitioner it is not a condition of service. Supreme Court in the above case only held that transfer is an incidence of service and therefore transfer of an employee is not a change in the condition of service. In ***State of U.P. And others v. Gobardhan Lal ((2004) 11 S.C.C. 402)*** Apex Court held as follows:

> "It is too late in the day for any government servant to contend that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra, in the law governing or conditions of service. Unless the order of transfer is shown to be an outcome of a mala fide exercise of power or violative of any statutory provision (an Act or rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with as a matter of course or routine for any or every type of grievance sought to be made. Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but

> cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. This Court has often reiterated that the order of transfer made even in transgression of administrative guidelines cannot also be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by mala fides or is made in violation of any statutory provision."

The above observations used shows that transfer is an incident to service and it is a condition of service. University senate is given power to frame statute to regulate service conditions, first contention is not tenable.

4. With regard to question of previous concurrence of the Government the earlier identical amendment of the First statute was set aside and Supreme Court finally held that it is for the University or Senate to amend the statute and Division Bench decision of this Court was upheld. Thereafter Government forwarded the above judgment to the University to act accordingly. Thereafter University Senate considered the

matter as requested by the Government. Hence it cannot be stated that there is no previous concurrence in passing the Statute. After passing the statute, government notified the same also. In the above circumstances it cannot be stated that there is no concurrence from the Government. Therefore on that ground also impugned Statute cannot be quashed.

5. It is true that under Section 57, management was given the power of appointment. But that is not an absolute power to appoint anybody according to the wishes. The power of appointment itself is regulated. Appointments can be made as per the terms of the Statutes and Act. Qualification, age and other conditions are prescribed in the statute. It has to be fulfilled by the management. Therefore, even though power of appointment is given by the management it is governed by the statute. With regard to transfer also, power is vested with the management. University being an independent self governing authority this Court will not interfere in the statute unless it is arbitrary or illegal. We are of the opinion that University has got power to fix the norms of transfer. But

ultimately transfer has to be done by the management and not by the University and the incidental powers of the Management in appointment or transfer are not affected by framing the guidelines for transfer.

6. Now we will consider whether the impugned statutes are unreasonable and arbitrary. A Division Bench of this Court in W.A.No.2728/01, observed that all contingencies may not have been considered by the Senate and there may be some overlapping circumstances also. We are of the opinion that the impugned Statute only gives the guidelines for transfer. But that will not mean that while implementing the transfer guide lines, management need not follow other provisions of the Act or directions of U.G.C etc. Suppose in a given case a College must have seven PHD candidates in a subject while considering transfer application of a teacher to the home district etc. management can always consider such conditions. Power of management to transfer an employee in the exigencies of service like fulfilling the conditions prescribed by the University are not prohibited provided there is no mala fides or

victimisation. A teacher who is transfered on disciplinary grounds also stands on a separate category. We are of the opinion that norms mentioned in the statute are not exhaustive. However, transfers should not be mala fide or arbitrary and if there are transfers which are not strictly in accordance with guidelines prescribed in the Statute it is for the management to justify the same. In the above circumstances there is no reason to set aside the impugned Statute. Therefore O.P.Nos.22784/1997, 2783/98, O.P.Nos.4666/98, 7653/1998 and W.P.(C).No.25521/2004 are dismissed.

7. In W.P.(C).Nos.15477, 15434 of 2005 and O.P.No.21788/98 petitioners have also challenged the order of the government in extending the date of option in case of inter university transfer. Provisions regarding inter University transfer is under Section 64 of the Kerala University Act. Section 64 of the Act reads as follows:

64. **Transfer of teachers to other**

Univesities: (1). Where an educational agency has colleges under the jurisdiction of the Kerala University and also under the jurisdiction of the Calicut University, the educational agency shall, within three months of the commencement of this Act or within such further period, not exceeding three months, as may be granted by the Government for sufficient reason, prepare a seniority list of the teachers of all such colleges.

(2) After the preparation of the list under sub-section (1), the educational agency shall give a right of option to the teachers as to the University under the jurisdiction of which he opts to remain and the teachers shall be allotted to each University area in accordance with such option:

Provided that where the number of teachers who have opted to work under the jurisdiction of the Kerala University or the Calicut University is more than the number required, allotment shall be made on the basis of seniority.

(3) Any teacher aggrieved by any entry in the list prepared under sub-section (1) or by the allotment under sub-section (2) may appeal to Government within sixty days from the date of communication of the list or order of allotment to him, and the decision of the Government thereon shall be final.

(4) Where a teacher is allotted to a University area under this section, he shall not be transferred to a college affiliated to any other University.

(5) Nothing contained in this section shall apply in respect of principals of private colleges.

The above section very clearly provides that after framing of the seniority list and after the last day of option as mentioned in the Act, inter university transfer is not possible. But Government by Exts.P3 and P5 orders in O.P.NO.21788/98 allowed one more time for option for those employees who were having five years of service. It is true that earlier when writ petitions were filed, this Court directed the Government to consider the representations. After considering the matter orders were passed. We are of the opinion that in appeal proceedings government can only look into whether the order of the lower authority was correct or not as per law. After the preparation of the seniority list and after the final day of option as mentioned in Section 64, without amendment of the act, government cannot legally make exceptions against the provisions of the Act. But we note that transfers based on the above were not challenged for years and such transfers will not affect the existing employees and it was specifically mentioned that those transferred employees will become junior most. It is submitted that after filing of the writ petitions also some transfers were made on the basis of the above

Government order. But such transfers were not challenged. So, unchallenged transfers given earlier cannot be quashed in this petition. However here after without amending the Act no further inter university transfer can be made. If government feels that such an amendment is necessary, it is for the Government to take steps for amendment of the Act. We see no ground to interfere with the order of the Tribunal challenged in these writ petitions. With the above observations these writ petitions are disposed of.

J.B.KOSHY, JUDGE

T.R.RAMACHANDRAN NAIR, JUDGE

prp

J.B.KOSHY & K.P.BALACHANDRAN, JJ.

O.P.NO. OF 2006 ()

J U D G M E N T

1th January, 2007